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No. 89-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION, INC.,
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT SUPPLEMENTAL BRIEF IN OPPOSITION FOR WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

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In our Joint Brief in Opposition to the Petition for a Writ of Certiorari, we pointed out (Br. in Opp. 8) that ONG had filed a petition for review of FERC's certificate orders with the United States Court of Appeals for the District of Columbia Circuit. We also pointed out (*id.* at 8 n.4) that ONG had moved the D.C. Circuit to defer decision on that appeal until this Court acts on

ONG's petition, and to accept supplemental briefs on preemption if the petition is denied. The D.C. Circuit denied ONG's motion in an order issued on March 16, 1990 (Resp. Supp. App. 1a-2a). The D.C. Circuit stated: "[h]ad petitioner filed this motion in a timely manner following the Tenth Circuit's decision on November 22, 1989, the court might have considered enlarging the issues on review to include *the preemption question, which appears to have been addressed by the Commission*" (*id.* at 2a (emphasis added and citations omitted)). This characterization of the FERC orders, rendered by the court of appeals acting on direct review, supports our view of those orders (Br. in Opp. 11-15) and undercuts ONG's (Pet. 14-17, 19-20; Reply Br. 3-4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 20, 1990

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

Calendared For: 3/20/90

No. 89-1376

OKLAHOMA NATURAL GAS COMPANY,
A DIVISION OF ONEOK, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

WILLIAMS NATURAL GAS COMPANY, *et al.*,
Intervenors

Before: Ruth B. Ginsburg, Silberman and Thomas, Circuit Judges

ORDER

[Issued March 16, 1990]

Upon consideration of petitioner's conditional motion for leave to file supplemental briefs and to hold the court's decision on the merits of the appeal in abeyance, the response thereto, and the reply, it is

ORDERED that the motion be denied. The extent to which the National [*sic*] Gas Act serves to preempt state

regulation is not the subject of this petition for review; the court, therefore, does not require further briefing on this issue. *See, e.g., Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989).

Had the petitioner filed this motion in a timely manner following the Tenth Circuit's decision on November 22, 1989, the court might have considered enlarging the issues on review to include the preemption question, which appears to have been addressed by the Commission. *Compare Williams Natural Gas Co.*, 47 F.E.R.C. ¶ 61,308, at 62,102 n.5 (1989) (asserting that FERC's jurisdiction is exclusive) *with City of Pittsburgh v. FPC*, 237 F.2d 741, 749 (D.C. Cir. 1956) (appeals court has jurisdiction over issue resolved by Commission although not raised by petitioner). Petitioner, however, waited for three months and until three weeks before oral argument to bring this motion. We see no cause to permit alteration of the briefing schedule or of the contours of our review based on petitioner's tardy request. *See* Fed. R. App. P. 28(c).

Per Curiam